Neutral Citation: [2023] UKFTT 00376 (TC)

Case Number: TC08797

FIRST-TIER TRIBUNAL
TAX CHAMBER

Heard in public by remote video hearing

Appeal reference: TC/2020/00685

VAT – place of supply of football agent services – transfer of player from Sporting Lisbon to Inter Milan in 2016 – were the services supplied to the player or to Inter – both – was the payment of all or part of the €4 million paid by Inter to the agent payment for services supplied to it or third party consideration for services to the player - on the facts it was for services supplied to Inter so the place of supply was Italy – alternative argument – do the intermediary provisions in Article 46 PVD and paragraph 10 of schedule 4A VATA apply – yes – consideration of Vodafone 2 Marleasing and Lipjes - no liability to VAT in the UK – appeal allowed

Heard on: 22 and 23 February 2023 with written submissions received on 29 March 2023
Judgment date: 18 April 2023

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL

Between

SPORTS INVEST UK LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Jonathan Bremner KC of counsel instructed by Joseph Hage Aaronson LLP

For the Respondents: Isabel McArdle of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This appeal relates to the VAT treatment of a payment of €4 million ("**the payment**") received by the appellant (or "**Sports Invest**") from Football Club Internazionale Milano SpA ("**Inter**"), an Italian football club, in relation to the transfer ("**the transfer**") in August 2016, of a Portuguese football player (Joao Mario Naval da Costa Eduardo ("**the player**")) from Sporting Clube de Portugal ("**Sporting**"), a Portuguese football club, to Inter.

2. This is a "who supplied what to whom" case.

3. It is HMRC's position that the appellant supplied services to both Inter and to the player. Under a contract with the player, the appellant was entitled to a fee of 10% of the player's gross salary from Inter which was €30 million. So, output VAT of £438,954 is due on €3 million of the payment as this amount was third-party consideration paid by Inter for a supply made by the appellant to the player which was a supply made in the UK. Sports Invest say that all of the payment from Inter (and not just €1 million as alleged by HMRC) was consideration for services supplied by it to Inter, and consequently the place of supply of the services was Italy. Thus, no VAT is due on the payment.

4. Sports Invest also run an alternative argument. If the place of supply was in the UK, then the supply falls within the provisions of paragraph 10 ("**paragraph 10**") of schedule 4A to the Value Added Tax Act 1994 ("**VATA**"). This applies, inter alia, to supplies which consist of the making of arrangements for a supply by or to another person or any other activity intended to facilitate the making of such a supply. If this is right, then the parties are agreed that the place of supply of the appellant's services is outside the UK, and so there is no VAT due on the payment. HMRC say that the services do not fall within this provision which must be read in conformity with the provisions relating to intermediary services in Directive 2006/112/EC (the **"Principal VAT Directive"** or "**PVD**"), and since the appellant did not act in the name and on behalf of another person, it could not be an intermediary. Furthermore the provision of services relating to an employment contract is not a supply. And so the services cannot fall within the ambit of the domestic intermediaries legislation.

5. Both Mr Bremner and Miss McArdle made clear, eloquent, and helpful submissions, both oral and written, for which I am very grateful. I have carefully considered these, along with all of the evidence, in reaching my decision, but in so doing have not found it necessary to refer to each and every argument advanced by them on behalf of their respective clients.

THE LEGISLATION

6. The relevant legislation is set out in the appendix to this decision.

THE EVIDENCE AND FINDINGS OF FACT

7. The evidence in this case comprises a number of important documents as well as oral evidence given on behalf of the appellant by Mr Amil Kohansal who was employed by the appellant and who was the individual responsible for acting for the appellant in relation to the Transfer.

8. From the documents and oral evidence, I find as follows:

Background to the appellant's business

(1) The appellant is in business as an intermediary in the football industry (sometimes described as a football agent). The appellant was established in the UK and registered for VAT in the UK.

(2) The appellant sought out opportunities to represent football players and also sought out opportunities to represent or advise football clubs. The appellant's business had three main activities.

(3) Firstly, the appellant marketed itself to players with a view to being appointed the exclusive agent representing a particular player. This would involve entering into a representation agreement with the player conferring exclusivity on the appellant, and then that agreement would be registered with the English Football Association so that the English Football Association ("**the FA**") (and in due course others in the football marketplace) would know that the appellant was the sole representative having authority to act on behalf of the player. The FA provide a template player representation agreement which had to be used under the rules of the FA. Clause 4 of that template agreement could not be deleted without invalidating the player representation agreement. This would mean that the appellant would not be able to hold itself out as having the exclusive right to represent a player.

(4) Secondly, the appellant advised football clubs on identifying possible transfer targets, player development and other matters concerning the development of the club as a football business. The appellant was paid for those services by the clubs. As part of those services, the appellant assisted football clubs in trying to find, attract and develop football players that fitted the club's needs. This involved facilitating player transfers to clubs.

(5) Thirdly, the appellant provided advice on the negotiation of a player's employment terms, once the likelihood of a football player joining the particular club became more certain. The appellant also advised on the renegotiation of employment contracts between a player and a club where the player and club had an existing contractual relationship that was due to expire but wanted to continue that relationship.

(6) A player transfer involves the transfer of a player's registration from one club to another club. Depending on the facts, the appellant could be acting for one or more of the old club, the new club and/or the player. In any event, the appellant would typically take into account the interests of both clubs and the player, as it tried to build a long-term business relationship with all parties to the transaction.

(7) The transfer of a player from one club to another entails two distinct processes which happen in parallel, namely:

> (a) A player must be willing to move to a new club and be able to agree the terms of an employment contract with the new club. These terms will typically concern, amongst other matters, salary and bonus entitlements of the player, player duties and the duration of the contract; and
>
> (b) The old club and new club must agree on terms for the player's registration to be transferred to the new club. A professional football league has rules that require a club to hold a player's registration (and give proof of the registration) before that player can play

for that club. It is not possible for two clubs to hold a player's registration at the same time. Therefore, the transfer of a player from one club to another involves the transfer of the player's registration. It is common practice for the new club to pay a fee to the old club for the transfer of a player's registration.

(8) In order for a successful transfer to occur, both of these processes (i.e. (a) the reaching of an employment contract between player and new club and (b) the reaching of an agreement between old club and new club for the transfer of the player's registration) must take place at the same time so that, from that point, the player is an employee of the new club and the new club is recognised by its football association as holding the player's registration.

(9) The appellant's policy was not to charge its player clients a fee for services provided to them. This was also commonly the policy of other successful football agents that could afford to adopt such a policy. This gave them a competitive advantage over those agents who charged their player clients. As a result of this policy, the appellant's activity of advising football clubs became important for bringing in sufficient fee income to sustain the appellant's business.

Services to the player, Inter and Sporting

(10) In 2015 and 2016, over a 6 month period, the appellant marketed itself to the player with a view to becoming his exclusive agent. They signed a player representation agreement on 16 May 2016. This was for a 3 month period and was intended to be a trial run to see how the appellant performed. That agreement was registered with the FA. That agreement came to an end on 31 July 2016.

(11) Following discussions with the player about a possible move to a new club, that agreement was amended and extended, and a second player representation agreement was entered into between the appellant and the player on 1 August 2016 (the **"Player Representation Agreement**"). This was in anticipation of the player moving clubs during the summer transfer window 2016 (between roughly 1 June 2016 to 1 September 2016).

(12) I was provided with two short documents which were described as "waiver letters" one of which related to the first player representation agreement and the second related to the Player Representation Agreement. It was Mr Khohansal's evidence, which I accept, that these were signed by him and given to the player on the same dates as the relevant player representation agreements were signed. I shall refer to the waiver letter in respect of the Player Representation Agreement as the "**Waiver Letter**".

(13) The appellant was approached by Inter, who knew that the appellant had the exclusive rights to represent the player, with a view to securing the appellant services to effect a transfer of the player from Sporting to Inter. Inter's coaching staff had already identified the player as one who would fit into Inter's strategic football plans. The appellant discussed with Inter what their terms for a transfer might be. The appellant also approached Sporting to see whether the player was for sale and at what price. It told the player that Inter was interested and their terms, and discussed whether those terms would be attractive to the player, and indeed whether he would be willing to move in the first place. It then mediated (in a non-technical sense) between the parties with a view to securing a deal between Sporting, Inter and the player, which was in the best interests of all concerned, and which would result in a transfer of the player's registration from Sporting to Inter and an employment contract between the player and Inter

on the same date.

(14) The negotiations which were undertaken between the parties, and which were organised and conducted by the appellant were highly complex and challenging requiring many hours of meetings and intense discussions between the appellant, Inter and Sporting. The chairman of Sporting at one stage had suggested an unrealistically high (in Inter's view) transfer fee and in order to resolve the position, the appellant arranged a meeting between the chairman of Sporting, and the chairman of Inter. This successfully resolved the position, and a transfer of the player took place on or around 28 August 2016 when the players registration was transferred from Sporting to Inter, and the player entered into an employment contract with Inter.

(15) On 25 August 2016 Inter and the appellant entered into an agreement (the "**Inter Agreement**") in relation to the supply of services to Inter.

The Player Representation Agreement

(16) The Player Representation Agreement was between Mr Amir Ali Kohansal (defined as "**the Intermediary**") of the appellant and Joao Mario (defined as "**the Player**").

Clause 1 provides:

> *"***APPOINTMENT**
>
> 1. The Intermediary is appointed by the Player to provide services on the following terms:
>
> To provide introductions, leads, assistance and advice in relation to a transfer of the registration of the Player from Sporting Clube de Portugal ("Transfer") to another football club. If the Intermediary introductions, recommends and/or negotiates the terms of any Transfer and/or employment contract on behalf of the Player with any football club or any employee, officer, agent, professional advisor or other representative of any football club, for the purposes of this Contract, such football club shall be an "introduced Club"".

(17) Clause 2 provides:

> "**DURATION**
>
> 2. The Contract shall take effect on the 1st of August and will terminate on the 1st of September without notice but subject always to clause 5 below".

(18) Clause 3 provides:

> **"EXCLUSIVITY**
>
> The Player is contracted to the intermediary on a sole and exclusive basis".

(19) Clauses 4 to 5 provide:

"**REMUNERATION**

4. The Player shall pay to the Intermediary a commission amounting to 10% of the Player's total gross income, image rights payments and other remuneration ("Fee") payable to the Player under any employment contract entered into by the Player with any introduced Club, such Fee could be paid annually during the length of the employment contract.

5. It is noted that where a Transfer is proposed, the Intermediary shall use reasonable endeavours to procure that the Introduced Club take on responsibility for the remuneration obligations set out in clause 4".

The Waiver Letter

(20) The terms of the Waiver letter are set out below:

"**Amir Ali Kohansal of Sports Invest UK Limited (the 'Company')**

Joao Mario Naval da Costa Eduardo (the 'Player')

We refer to Clause 4 of the representation Agreement entered into between Amir Ali Kohansal and Joao Mario Naval da Costa Eduardo on the 1st of August 2016.

I can confirm on behalf of myself and the Company that, following further discussions and agreement between us, we have agreed to waive all and any fees relating to any commission/image rights which would be due to us in respect of your annual income pursuant to Clause 4. This contract waiver is lawfully binding as long as Sports Invest UK Ltd have been involved in the transfer of the player from his current club to a new club.

I also confirm that at no time the "player" will have to make any payment to "the company" regarding to transfer commissions, this payment must be supported entirely by the clubs. The player also cannot be blamed or punished for failures in the payments of transfer fees from Sporting Clube de Portugal or the "Introduced Club".

Yours sincerely

[Signed by Mr Amir Ali Kohansal]".

(21) The waiver letter in respect of the player representation agreement of 16 May 2016 is different from the Waiver Letter in that in the former, the third paragraph set out above is absent.

The Inter Agreement

(22) The salient provisions of the Inter Agreement are set out below.

(23) A first Recital A provides:

> "A. Inter has shown interest in the permanent transfer of, and the execution of a sports labour contract with, the professional player Joao Mario Naval da Costa Eduardo, born on 19.01.1993 in Porto – Portugal (hereinbelow 'Player') currently registered at Sporting C.P'".

(24) A second recital A provides:

> *"*A. Inter has shown the Intermediary in compliance with the Regolamento Procuratori sportive F.I.G.C., interest in avail [sic] itself of his activity to the end of the negotiation of the transfer agreement with Sporting C.P. and the sports labour contract with the Player".

(25) Recitals C and D provide:

> *"*C. Intermediary hereby declares and guarantees to be entitled to sign this agreement and to perform the relevant activity which shall be carried out in full compliance with the applicable law and sports regulations in particular the Regolamento Procuratori sportive F.I.G.C;
>
> D. Intermediary hereby declares to be also the Intermediary of the Player and that he shall carry out his activity exclusively in the interest of Inter and of the Player".

(26) The operative clauses then go on to provide:

> "All this being stated, the parties hereto agree and stipulate the following.
>
> 1. The premises constitute an integral, essential and binding part of this agreement.
>
> 1. This agreement shall be valid and binding between the parties from the date of its signature till 31 August 2016".

(27) Clauses 2 to 4 provide:

> "2. As for the activity that the Intermediary shall carry out in the interest of Inter, but at the double condition that, within 31 August 2016:
>
> a) Inter and the Player effectively enter into a sport labour contract, such a contract to be till 30 June 2021 for a whole fixed gross salary equal or lower than €30.000.000,00 (thirty million euro); and
>
> b) the Player is permanently transferred to, and effectively registered at, Inter against a fixed transfer fee to be paid to Sporting C.P. equal or lower than €45.000.000,00 (forty-five million euro);

then Inter shall pay the Intermediary the whole amount of €4.000.000,00 (four million euro), which shall be paid as follows:

a) €500.000,00 within 30 September 2016;

b) €500.000,00 within 31 December 2016;

c) €500.000,00 within 31 March 2017;

d) €500.000,00 within 30 June 2017;

e) €500.000,00 within 30 September 2017;

f) €500.000,00 within 31 December 2017;

g) €500.000,00 within 31 March 2018;

h) €500.000,00 within 30 June 2018;

3. In case the double condition above referred does not take place within the term and at the conditions provided under art. 3, nothing shall be due by Inter to the Intermediary.

4. The amount under clauses 3, if become due, shall be paid by Inter against suitable invoices and any required fiscal document, by bank wiring on the current account headed to the Intermediary, which shall be communicated by the latter. Such amounts must be deemed as included any cost and/or expense borne by the Intermediary or his co-workers or partners carrying out his activity".

Invoice

(28) The invoice issued by the appellant to Inter on 5 December 2017 is for €500,000 and is described as:

"As per the Intermediary Agreement between F.C. Internazionale Milano S.p.A. and Sports Invest UK Ltd in relation to the permanent transfer of the Player, Joao Mario Naval da Costa Eduardo from Sporting Clube de Portugal to F.C. Internazionale Milano S.p.A".

FA Regulations on working with intermediaries 2016-2017 ("FARI")

(29) I was taken to a number of these regulations by Miss McArdle. The relevant ones are these:

"A GENERAL PRINCIPLES

…

3 A Club, Player, Intermediary or other Participant must not so arrange matters as to conceal or misrepresent the reality and/or substance of any matters in relation to a Transaction.

…

B. REPRESENTATION CONTRACT

…

5 All parties to a Representation Contract must inform The Association in writing of any early termination, novation, variation or other event that affects the validity or status of a Representation Contract (save for the natural expiry of the contract), within 10 days of such event.

C. REMUNERATION

…

2 Where an Intermediary undertakes Intermediary Activity for a Player, the Player may discharge his obligations to pay the Intermediary as specified in either the Representation Contract between the parties or the relevant paperwork submitted to The Association to register the Transaction in one, or more, of the following ways only:

(a) the Player may pay the Intermediary directly; and/or

(b) only where the Player makes a request in writing to the Club, the Club may:

(i) make an actual deduction in periodic instalment(s) from a Player's net salary in favour of the Intermediary, so that the sums are deducted and paid in discharge of the Player's obligation to the Intermediary contained in the relevant Representation Contract or the relevant paperwork submitted to The Association; and/or

(ii) discharge the Player's liability towards his Intermediary, as contained in the relevant Representation Contract or the relevant paperwork submitted to The Association, on the Player's behalf as a taxable benefit.

3 Where the Intermediary and the Player agree in the Representation Contract that a commission (either by way of lump sum or by instalments) is to be paid in respect of a Transaction, it shall be calculated on the basis of the Player's Basic Gross Income as set out in the employment contract concluded by the Player in respect of which he was represented by the Intermediary.

…

11 As a recommendation, Players, Clubs and Intermediaries may adopt the following benchmarks:

(a) The total amount of remuneration per Transaction due to Intermediaries who have been engaged to act on a Player's behalf should not exceed three per cent (3%) of the Player's Basic Gross Income for the entire duration of the relevant employment contract.

(b) The total amount of remuneration per Transaction due to Intermediaries who

have been engaged to act on a Club's behalf in order to conclude an employment contract with a Player should not exceed three per cent (3%) of the Player's eventual Basic Gross Income for the entire duration of the relevant employment contract.

(c) Subject to Regulation E5, the total amount of remuneration per Transaction due to Intermediaries who have been engaged to act on a Club's behalf in order to conclude a transfer agreement should not exceed three per cent (3%) of the eventual transfer compensation paid in connection with the relevant transfer of the Player".

Mr Kohansal's evidence in cross examination

(30) Mr Kohansal's evidence was tested by Miss McArdle in cross examination. In addition to his evidence in chief this elicited the following evidence in respect of which I make findings of fact later in this decision.

(31) The transfer of the player from Sporting to Inter was an important deal both for the clubs and for the player.

(32) One of the attractions to clubs in securing the services of the appellant was that it had exclusivity to act for good players. Clubs like dealing with agents with such exclusivity.

(33) The reason for the waiver letters, and in particular the Waiver Letter was to ensure that there was no need to change the FA player representation contract template. If the parties had deleted clause 4 from the Player Representation Agreement, then it was his view that this would have required the amended agreement to be sanctioned by the FA, who would not have done so because it departed materially from the terms of the template.

(34) However, there was no need to notify the FA to the change in terms resulting from the Waiver Letter since the letter did not, in his view, amend the terms of the template.

(35) The Waiver Letter reflected the appellant's policy towards charging players the commission which was set out in their representation agreements, namely that they never did so, and that was true in the case of the player under the Player Representation Agreement. The appellant did not intend to, and did not, seek to enforce the provisions of clause 4 of the Player Representation Agreement, and that was the purpose of the Waiver Letter.

(36) The Waiver Letter was given to the player at the same time as entering into the Player Representation Agreement.

(37) Whilst it was possible under the FARI for Inter to pay the commission under the Player Representation Agreement, the appellant did not approach Inter, and ask it to do so. There was no need because that obligation to pay had been waived by the Waiver Letter.

(38) The 3% benchmark commission set out in FARI is not binding and is simply a recommendation. The FA know, because they see a large number of player representation agreements, that commissions of 5 to 10% are commonly agreed in player representation agreements. And they do not declare those to be invalid.

(39) The 10% commission which was included in clause 4 of the Player Representation

Agreement was a standard rate which the appellant charged its players, in the knowledge that (subject to the circumstances set out in the next paragraph) it would not ask for payment of the commission from those players. Nor, because it was waived, would the appellant seek it from the transferee club. The appellant would make its money by charging that club for the services which it supplied to the club.

(40) However, if a player was in breach of the terms of his/her player representation agreement, for example he/she went to another agent, then the appellant would enforce its right to commission under clause 4 of the agreement. This is the reason why a proper rate of commission was included rather than a nominal one.

(41) The commission payable by Inter to the appellant under the Inter Representation Agreement was Inter's liability and not a liability of the player.

(42) Inter would not have approached the appellant had it not been for the fact that the appellant had exclusive rights to represent the player.

(43) Inter would not have known of the terms of the Player Representation Agreement, nor of the fact that the appellant was not going to be paid a commission by the player. Provided the fee which was payable to the appellant by Inter was acceptable to Inter, Inter would not have cared how that fee had been made up.

(44) The player saw the Inter Representation Agreement but only at the point of signing his employment contract with Inter.

(45) The vast majority of the time (90%) spent by the appellant was on negotiations over the transfer fee.

(46) The appellant's fees under the Inter Representation Agreement, which were payable by instalments over, roughly, two years, were payable irrespective of the playing position of the player (whether he was injured, whether he was successful, whether he was transferred or loaned to another club).

(47) The Inter Representation Agreement was entered into on 25 August 2016, and this was after the vast majority of the work done by the appellant had been completed. This is reflected in the fact that in that agreement, the player's salary and his transfer fee along with the appellant's fees are set out in detail. This could not have been the case until all of the essential elements of the deal had been agreed. By 25 August 2016, all of the essential work had been done, and there was little more for the appellant to do.

(48) The mechanics and operational practicalities of securing the transfer (including dealing with the paperwork relating to the Portuguese and Italian football governing bodies) was undertaken by the clubs. This could only be done once the player's employment contract and transfer fee had been agreed.

APPROACH TO THE EVIDENCE

9. The approach I intend to adopt towards this evidence is set out in the Court of Appeal

decision in ***HMRC v Newey*** [2018] EWCA Civ [2018] STC 1054 ("***Newey CA***"):

> "WHEN IS A SUPPLY OF SERVICES EFFECTED FOR CONSIDERATION?
>
> [38] It has long been established that a supply of services (such as advertising) is effected 'for consideration', within the meaning of art 2(1) of the Sixth Directive, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, and the remuneration received by the provider of the service constitutes the value actually given in return for the service supplied to the recipient: see the judgment of the CJEU in the present case at para 40, referring to *Macdonald Resorts Ltd v Revenue and Customs Comrs* (Case C-270/09) EU:C:2010:780, [2011] STC 412, [2010] ECR I-13179, at para 16 and the case law there cited. It follows that the concept of a supply of services is 'objective in nature and applies without regard to the purpose or results of the transactions concerned and without its being necessary for the tax authorities to carry out inquiries to determine the intention of the taxable person': ibid, at para 41.
>
> [39] It does not, however, follow from the requirement for there to be a 'legal relationship' between the supplier and the recipient of a supply of services that the relationship must be contractual, or (if it is) that the terms of the contract are necessarily conclusive. As the CJEU put it (again in the present case) at para 42:
>
> > 'As regards in particular the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case law of the court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT …'.
>
> The Court cited as authority for this proposition *Revenue and Customs Comrs v Loyalty Management UK Ltd, Baxi Group Ltd v Revenue and Customs Comrs* (Case C-53/09) EU:C:2010:590, [2010] STC 2651, [2010] ECR I-9187, at paras 39 and 40.
>
> [40] Thus the contractual arrangements agreed between the parties cannot, by themselves, be determinative of the VAT analysis, although they will usually provide the starting point, and are likely to be conclusive unless shown to be inconsistent with underlying economic and commercial realities: see WHA Ltd v Revenue and Customs Comrs [2013] UKSC 24, [2013] STC 943, [2013] 2 All ER 907, at [27] per Lord Reed JSC, and Revenue and Customs Comrs v Airtours Holidays Transport Ltd [2016] UKSC 21, [2016] STC 1509, [2016] 4 WLR 87, at [47] per Lord Neuberger PSC".

10. This reflects the view of the court in ***HMRC v Newey*** (Case C-653/11) [2013] STC 2432 ("***Newey CJEU***") where one of the questions referred was:

> "In circumstances such as those in the present case, what weight should a national court give to contracts in determining the question of which person made a supply of services for the purposes of VAT? In particular, is the contractual position decisive in determining the VAT supply position? "

11. The answer to that question was given in paragraphs 42 to 44 of the CJEU's decision as follows:

"42 As regards in particular the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case-law of the Court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT (see, to that effect, Joined Cases C-53/09 and C-55/09 Loyalty Management UK and Baxi Group [2010] ECR I-9187, paragraphs 39 and 40 and the case-law cited).

43 Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a 'supply of services' transaction within the meaning of Articles 2(1) and 6(1) of the Sixth Directive have to be identified.

44 It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.

45 That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions".

12. In considering the evidence in this case, I shall start by considering the meaning and effect of the relevant contractual terms in order to determine whether the appellant was supplying services to Inter, to Sporting or to the player. I will then consider whether those contractual terms reflect economic and commercial reality.

DISCUSSION

Burden of proof

13. HMRC have the burden of establishing that the assessments are valid in time assessments which have been properly served on the appellant. If it can establish this, then the burden of proof switches to the appellant who, on the balance of probabilities, must show that the assessments are wrong if it is to succeed in this appeal.

14. The appellant has not challenged the validity of the assessments which I find to be valid.

Submissions

15. In his skeleton argument and initial oral submissions Mr Bremner submitted, in summary, as follows:

(1) In order to be chargeable to UK VAT, the payment must be consideration for a supply of services made in the UK (section 4(1) VATA). It is common ground in the present case that (a) Inter is a "relevant business person" for the purposes of section 7A VATA; and that (b) the player is not a "relevant business person" for the purposes of section 7A VATA.

(2) As a result, if the payment was for a supply of services by the appellant to Inter, then the place of supply is Italy (the country in which Inter belongs). On that footing, the appeal will succeed without it being necessary for the tribunal to consider paragraph 10 Schedule 4A VATA ("**paragraph 10**").

(3) If, however, the payment was for a supply of services by the appellant to the player, then it will be necessary to address whether paragraph 10 Schedule 4A VATA is engaged.

(4) The appellant's primary case is that the payment was consideration for a supply of services to Inter. It was not consideration for a supply of services to the player. As a result, the place of supply is Italy (being the country in which Inter belongs) and the payment is not chargeable to UK VAT.

(5) A supply of services is effected "for consideration" within the meaning of Article 2(1)(c) PVD (formerly Article 2(1) Sixth Directive) "only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, and the remuneration received by the provider of the service constitutes the value actually given in return for the service supplied to the recipient" (see, for example, *Newey CA* at [38]).

(6) Consideration paid by a third party may be consideration for a supply but that still must be a supply. Businesses do not usually make payments unless they get something for it. Whether consideration is given for a supply and if so the nature of that supply is highly fact dependent, see *HMRC v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 15 at [68]: "It is also important to bear in mind that decisions about the application of the VAT system are highly dependent upon the factual situations involved. A small modification of the facts can render the legal solution in one case inapplicable to another".

(7) There is no suggestion that the arrangements in this appeal are anything other than genuine. There is no allegation of sham. The facts show that the payment by Inter was made in consideration for a supply of services by the appellant to Inter and was not third party consideration for a supply of services to the player.

(8) Mr Kohansal's evidence should be treated as credible and reliable. He wanted to assist the tribunal. Although he was cross examined in relation to some legal matters, namely his interpretation of the contracts, his views are clearly not binding but might be helpful context.

(9) One starts with the contracts and then test them against economic and commercial reality. HMRC have not done this in this case. Indeed, they have done the reverse. They have started with what they perceive as economic and commercial reality and then sought to rewrite the contracts in order to justify their position.

(10) It is clear from the Inter Agreement that payment was made for the supply of services to Inter. There is nothing in it which suggests that Inter is making a payment in consideration for the services supplied to the player. Indeed, under clause 4 of the Player Representation Agreement, the appellant had no right to recover the 10% commission theoretically payable under that agreement by virtue of the Waiver Letter. But even without the Waiver Letter, there is no contractual indication that the payment by Inter is consideration for services supplied by the appellant to the player. There is no reciprocity of supply and consideration between the player and the appellant.

(11) The player is party to the Inter Agreement which is a bilateral contract between the appellant and Inter. Inter made payment to the appellant under the terms of the Inter Agreement, because it was obliged to do so thereunder. It made payments in accordance with the payment schedule.

(12) The only legal agreement between the appellant and the player was the Player Representation Agreement. The payment was not made under that agreement, as mentioned above, both on the facts but also because the appellant had no right to be paid by the player under that agreement by virtue of the Waiver Letter.

(13) The Waiver Letter reflects the policy which the appellant had towards its players that it would not enforce its rights to commission under its representation agreements, nor would it seek to recover that commission from the new club. There was a sensible commercial rationale for this in that it gave the appellant a competitive advantage over those agents who would insist on being paid their commission either by the player or by the club. There was also a sensible commercial rationale for the commission being set at 10%. This was to prevent a player going elsewhere when that player had granted exclusivity to the appellant. It thus enabled the appellant, if the player had been in breach of its obligations, to recover its commission from that recalcitrant player.

(14) The 3% commission guideline in FARI was a guideline. The FA were fully aware that agents charged higher rates of commission and tacitly sanctioned that.

(15) The payment is 10% on the €40 million transfer fee payable by Inter to Sporting. This is in line with the market.

(16) The terms of the Waiver Letter, which clearly binds the appellant, is equally clear that it "waives all and any fees relating to any commission…" Furthermore, in the broader commercial and economic context, this makes commercial sense.

(17) In order for HMRC to show that the Player Representation Agreement as amended by the Waiver Letter was the contractual source of the payment requires them to amend the terms of that contract as amended, and there is no evidence that there was such amendment. Furthermore, it would be commercially unrealistic for Inter to make a payment over 2 years if it reflected third party consideration for services by the appellant to the player in negotiating the players employment contract with Inter, which was for a 5 year contract. In those circumstances one would expect the payments to be made over a 5 year period, with some arrangements if the player moved on or was injured. Indeed, Inter made two instalments of the payment after the player had been lent to another club. It is unlikely that they would have done this had the payment been made under the Player Representation Agreement.

(18) The contracts show that the payment was made for services supplied to Inter in relation to the transfer of the player, and not the services supplied to the player under the Player Representation Agreement.

(19) If, contrary to the appellant's primary case, there was a supply by the appellant to the player the place of that supply is Italy (and not the UK) applying paragraph 10.

(20) HMRC does not deny that if paragraph 10 applies then the place of supply is outside the UK. Rather, the debate between the parties is as to whether paragraph 10 is engaged in the present case.

(21) Paragraph 10(2) provides that:

> "(2) This paragraph applies to a supply to a person who is not a relevant business person consisting of the making of arrangements for a supply by or to another person or of any other activity intended to facilitate the making of such a supply".

(22) Paragraph 10 seeks to implement Article 46 PVD.

(23) The appellant submits that paragraph 10(2) applies. If there was a supply of services for VAT purposes by the appellant to the player, that supply was integral to and facilitated a supply from Sporting to Inter of the player's registration.

(24) HMRC's case is that the supply to the player was that of negotiating his employment contract with Inter.

(25) In order for a football transfer to occur it is necessary both (a) for the player to be willing to move to a new club and to agree the terms of an employment contract with the new club; and (b) for the old club and the new club to agree on terms for the player's registration to be transferred to the new club.

(26) Therefore, any supply by the appellant to the player, including, on HMRCs case, negotiating his employment contract with Inter, was intended to facilitate the making of a supply by Sporting to the player (namely the transfer of the player registration). Paragraph 10 therefore applies (compare the approach of the VAT & Duties Tribunal in *The Finest Golf Clubs of the World v HMRC* (Decision no 19347) [2005] Lexis Citation 929 at [16]).

(27) Even though the employment contract is not a supply for VAT purposes, this does not prevent the application of the provisions of paragraph 10 from applying. This can be seen from the Judgment of the CJEU in ***Staatssecretaris van Financien v Lipjes*** (Case C-68/03) ("***Lipjes***"). At [21]:

> "As stated by the Advocate General in paragraphs 36 to 40 of his Opinion, for the purposes of determining the place of an intermediary's activities, it does not matter whether the principal transaction is subject to VAT or whether the transaction is non-taxable".

(28) On the footing that there was a supply for VAT purposes both to the player and to Inter, the appellant was making a supply of services both to the player and to Inter for a single fee. On this analysis, the result would be that the place of supply of each of those services would be the same (namely Italy).

16. In her skeleton argument and oral submissions, Miss McArdle submitted, in summary, as follows:

(1) First, considering the Player Representation Agreement and Inter Agreement, it is clear that the appellant supplied services to both the player and to Inter.

(2) The Player Representation Agreement is explicit in stating that the player is to receive services, on an exclusive basis, and specifies what services are to be provided. Contrary to what the appellant submits, this is the most important document, and not the Inter Agreement.

(3) There is no evidence that the appellant did not provide these services. Indeed Mr Kohansal's evidence was that the appellant supplied services to the player. When considering

Mr Kohansal's evidence I should be conscious that some was helpful for HMRC, and that its importance concerns the economic reality of the arrangements. His evidence was highly inconsistent, but importantly his evidence was clearly that the appellant supplied few if any services to Inter after the signing of the Inter Agreement on 25 August 2016. Consequently, the appellant could not have supplied services to Inter until then and thereafter.

(4) The starting point for determining the economic and commercial reality of the supply and consideration between the appellant and the player is the contracts. They will normally indicate the reality of the supply.

(5) The Player Representation Agreement, on its face, states that services are to be supplied by the appellant to the player. Clearly, the player wished to be represented by an agent in seeking a transfer of employment, and the evidence is unambiguous that the appellant was the legal person which provided those services.

(6) Negotiations were, by Mr Kohansal's own account, highly complex and challenging. The player was represented by the appellant throughout that process.

(7) The Inter Agreement includes words evidencing that the appellant was providing services to the player relating to the proposed transfer.

(8) Further, the appellant had a contractual right to payment under the Player Representation Agreement, in the form of 10% of the gross salary and other renumeration agreed. It would be commercially absurd for the appellant to provide such services in exchange for such valuable consideration, but choose to go unpaid. Had no consideration been due, the contract would have provided for nominal consideration only, or the services could be provided on a non-contractual basis.

(9) On the contrary, the appellant was contractually obliged to seek third party payment of the consideration, from the club under clause 5 of the Player Representation Agreement. There is no basis to believe the appellant did not comply with this contractual obligation. Whilst the Waiver Letter might have waived the appellant's right to consideration under clause 4 of that agreement, it did not affect the appellant's rights under clause 5, namely to use reasonable endeavours for Inter to take on responsibility for payment of the commission. Indeed if there was never any intention of the appellant enforcing its rights under clause 4, there would have been no need for clause 5 of the Player Representation Agreement.

(10) Stepping back, the contractual obligation for the player to pay for the services provided for in the Player Representation Agreement, and the obligation for the appellant to try to secure a third party to pay for those services, would not be included if the services were to be provided for free.

(11) In securing a payment for itself from Inter, the appellant achieved payment of all consideration due to it, including from the player. This occurred with full knowledge of the club that the appellant was acting on the player's behalf in the transfer negotiations as well as on its behalf, and that it was to pay the appellant the consideration due from the player.

(12) Indeed, clause 4 providing for payment under the Player Representation Agreement was required by the FARI.

(13) The appellant at some point in time signed waiver letters to release the player from clause 4. These documents were not disclosed by the appellant until March 2022.

(14) These documents were provided, HMRC contend, not because there was no obligation to pay, but the opposite: because the player was contractually obliged to pay for services, and because that obligation was discharged or to be discharged through a third party paying for those services.

(15) The terms of the Waiver Letter support the existence of consideration to be paid or already paid in relation to the appellant's services to the player. First, the Waiver Letter is not binding if a transfer takes place not involving the appellant: "This contract waiver is lawfully binding as long as Sports Invest UK Ltd have been involved in the transfer of the player from his current club to a new club". Consequently, there is a pre-existing obligation for the player to pay, and it remains enforceable in certain circumstances.

(16) Further, the Waiver Letter make clear that it is an enforcement right against the player which is being waived, not the payment itself, which a third party is to pay: "I also confirm that at no time the "player" will have to make any payment to "the company" regarding to transfer commissions, this payment must be supported entirely by the clubs" This document confirms, rather than contradicts, HMRC's position: the payment obligation was on or to be on a third party, namely Inter.

(17) The likelihood is that Inter, being an experienced and important football club, was well aware of the industry practice of players' fees for their agents' services being sought through third parties in the form of clubs to which they are transferring bearing those costs. Indeed it would be highly unlikely that Inter was not aware that this may be the case given its position in the football world.

(18) As Mr Kohansal himself states "Inter did know and have sight of the Player Representation Agreement". In other words, the club knew of the obligation under clause 5 for the appellant to use best endeavours to receive payment for the player's fees to the appellant from it, Inter. Clearly Inter entered into the Inter Agreement knowing that was going to occur.

(19) However, it does not matter what Inter intended or thought, VAT being a tax on objective supplies rather than subjective intentions. The contractual construction is clear: payment was to be made, and if possible obtained from, Inter. That has happened.

(20) HMRC contend that the evidence demonstrates that the fee of €4 million included payment of the appellant's fees for its services to the player based upon 10% of gross income for the player. That fee was agreed in the knowledge of Inter that the appellant was seeking payment of the player's fees by the club and under a duty to use its best endeavours to secure it.

(21) All the circumstances indicate that Inter understood it was paying the player's consideration, and that payment of the appellant's consideration was simply part of the overall deal with the club. It did not apparently expect him to repay the €3m. That cost was reflected in the overall deal with the player at the outset, and not treated as a debt to be repaid.

(22) It is clear from the Inter Agreement, that the activities for which the appellant was being paid included the services which have been supplied by the appellant to the player.

Furthermore, since the Inter Agreement was not signed until 25 August 2016, the only contractual obligation which was in existence before then was the Player Representation Agreement, and thus the only person to whom services could have been supplied before that date was the player. Since the appellant accepts that by 25 August 2016 most of its work had been completed, then that work must have been supplied to the player, and the consideration payable by Inter therefore, could only relate to those services. The payment therefore was third party consideration for those services.

(23) The appellant contends that Inter would not have agreed to pay the player's consideration when he might not play for the full term envisaged, and indeed he was loaned to West Ham FC in that time.

(24) Again, this is not a reason to displace the clear contractual terms which the parties complied with. Inter, in agreeing to pay a fee including the player's consideration for the appellant's services, will have done what it considered to be a commercial deal, well aware that the transfer may not ultimately be a successful one for any number of reasons. These would include the player wishing to leave, not performing well or becoming injured. Inter would have been fully aware of the risks involved and negotiated terms which it considered reflected the balance of risks and potential rewards. No doubt it did the same in whatever terms were agreed with West Ham.

(25) Paying the appellant's consideration was a relatively small and commercially necessary part of the deal with the appellant, not least because Inter knew that the appellant was obliged to seek that payment on the player's behalf.

(26) In summary. The player was obliged to pay commission to the appellant under clause 4 of the Player Representation Agreement. Clause 5 of that agreement obliged the appellant to seek payment from Inter. The Waiver Letter, if it was effective to waive the obligation to pay under clause 4, had no impact on the appellant obligation under clause 5. All the valuable work had been done by the appellant before 25 August 2016 when the only contract in place was the Player Representation Agreement. The appellant expected to be paid for the services it supplied to the player. The only services supplied to Inter were under the Inter Representation Agreement. No supplies were made to Inter after 25 August 2016. The deal had been done by then subject to some administrative finalisation. The payment therefore was for all the work that the appellant had done which included the work done for the player. This was important and valuable work as evidenced by the 10% commission payable under the Player Representation Agreement. Had it been otherwise, the consideration would have been nominal. Interpreting the contract in this way is consistent with economic and commercial reality.

(27) The appellant contends that, if there was consideration of €3m paid in respect of services to the player, then that supply falls outside UK VAT, because paragraph 10, applies.

(28) Paragraph 10 is part of the domestic implementation of Article 46 of the Principal VAT Directive (PVD) which provides:

> "The place of supply of services rendered to a non-taxable person by an intermediary acting in the name and on behalf of another person shall be the place where the underlying transaction is supplied in accordance with this Directive".

(29) The appellant did not make arrangements 'for a supply by or to another person' thus engaging paragraph 10, because in the context of the supply being made by the appellant to the player there was no underlying supply being arranged, only a contract of employment which is outside the scope of VAT.

(30) Any supply relating to Sporting transferring the player's registration to Inter was between those two parties, and the appellant was not an intermediary between them under the Player Representation Agreement.

(31) "Intermediary" must be given an autonomous EU law meaning. When making supplies to the player, the appellant was not performing the "making of arrangements for a supply by or to another person or of any other activity intended to facilitate the making of such a supply".

(32) The supply of player services under the Player Representation Agreement does not relate to the supply of the transfer of player registration from Sporting. It relates to the employment contract between the player and Inter, which is not a supply for VAT purposes.

(33) In contrast, the appellant was not, under the Player Representation Agreement, an intermediary providing services consisting of the making of arrangements for a supply of player registration by Sporting to Inter or of any other activity intended to facilitate the making of such a supply. It was not an intermediary between those parties when making the supply to the player; it was acting neither for the supplier nor the recipient, and therefore was not an intermediary in performance of services to the player.

(34) In order for Article 46 of the PVD to be engaged, an intermediary must be "acting in the name and on behalf of another person", which includes having the power to bind that other person in relation to the underlying transaction: see *University of Newcastle upon Tyne v HMRC* [2017] UKFTT 145 (TC) ("***Newcastle University***").

(35) The appellant, through the Player Representation Agreement, was not so acting in the name and on behalf of another person in relation to the transfer of the player's registration, a supply between the two clubs, nor between the player and anyone else. It had no power to bind either party to that supply.

(36) Consequently, the supply by the appellant to the player falls under the general place of supply rules under which in this instance is the UK, so UK VAT is due.

(37) The case of *Lipjes* does not assist the appellant. The case illustrates that the application of the predecessor legislation to Article 46, Article 28b of the Sixth Directive, did not turn on whether the parties to the underlying transaction were subject to VAT. The case concerned two intra-Community supplies of goods. The CJEU accepted that an underlying transaction took place in both instances, but the transactions were not subject to VAT as the suppliers were not taxable persons.

(38) In contrast, activities performed under a contract of employment are not transactions at all for VAT purposes as per Article 10 of the PVD:

> "The condition in Article 9(1) that the economic activity be conducted 'independently' shall exclude employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship

of employer and employee as regards working conditions, remuneration and the employer's liability".

(39) Thus, those acting under a contract of employment, such as the player, are not engaging in any transaction at all, recognised in the law of VAT. This is very different from the situation in *Lipjes*, where two non-taxable transactions occurred, namely ordinary supplies of goods, activities which were clearly accepted by the CJEU as transactions for the purposes of the law of VAT, but which happened not to be taxable given the status of the suppliers. That status made no difference to the existence of two transactions, and thus Article 46's predecessor was engaged.

(40) Paragraph 10, must be read consistently with the PVD, on the authority of *Marleasing SA v La Comercial Internacional de Alimentacion SA[1990] ECR I 4135* ("***Marleasing***") and thus the word "supply" in paragraph 10 must be read consistently with the PVD term "transaction" in Article 46, which does not include activities performed under a contract of employment.

(41) Consequently, an activity performed under a contract of employment does not constitute a transaction at all for VAT purposes, and thus the appellant was not acting as an intermediary when performing services for the player. There was no underlying transaction so paragraph 10, read consistently with Article 46, was not engaged. As a result, this secondary argument fails.

17. In his reply Mr Bremner submitted in summary:

(1) He rejected the criticisms of Mr Kohansal's evidence.

(2) HMRC's approach does not reflect the relevance of the contracts and the impact of the commercial and economic reality. One must start with construing the contracts and then consider them in light of the economic and commercial reality. HMRC are doing things the wrong way round.

(3) One needs to consider the real deal, i.e. the actual deal. Under the Player Representation Agreement the commission was to be 10%. Speculation that it might have been different, or that it differs from the 3% guideline set out by the FA is neither here nor there.

(4) The reason why neither the clauses 4 or 5 of the Player Representation Agreement were deleted from that document was because it needed to conform to FARI.

(5) The appellant did not approach Inter to obtain payment from Inter on behalf of the player pursuant to clause 4 of the Player Representation Agreement. The Waiver Letter clearly waived the appellant's rights to any payment under clause 4. Because of this, there was no right to payment which could be visited on Inter.

(6) The evidence is that the Waiver Letter was signed and given to the player at the same time as the Player Representation Agreement.

(7) The submission that because the Inter Agreement was not executed until 25 August 2016, and thus supplies made before that date could not have been made to Inter is a new argument made for the first time in oral submissions. However, it is clear from, for example, [39] *Newey CA* that there is no need for the required reciprocity to arise under a contract. There is no

difficulty of there being a VAT supply without a contract being in place. Essentially, money paid in return for an activity is a supply. So an activity which pre-dates the entering into of a contract, and in respect of which payment is then made subsequently, can still be consideration for the pre-contractual activity.

(8) As is clear from the evidence, and appears to be accepted by HMRC, the appellant was undertaking significant activities for Inter before 25 August 2016. It is equally clear from the Inter Agreement that the consideration payable under clause 2 of that agreement was payable for the activities identified in sub paragraphs 2 a) and b) of that agreement, namely for the player entering into an employment contract, and being transferred to and registered with, Inter.

(9) There is no evidence that Inter took on the player's obligation to pay the appellant under clause 4 of the Player Representation Agreement. That is wholly consistent with the fact that there was no such obligation by dint of the Waiver Letter.

(10) One must look at the actual deal which was done between the parties. And that deal is that a payment by Inter to the appellant was made for the services supplied to Inter and not for services supplied to the player.

(11) I need to construe paragraph 10 in accordance with EU principles. Paragraph 10 has two limbs, and the appellant's activities clearly fall within the second limb since they are an other activity intended to facilitate the making of a supply. The supplier to the player of services in respect of the players employment contract was integral to and facilitated the supply of the player's registration from Sporting to Inter.

(12) In *Newcastle University*, the domestic law was not an issue (see [50] of that decision). Furthermore, that decision reviewed insurance intermediary cases under totally different legislation from that which is the case in this appeal.

(13) There is nothing in the UK domestic legislation which requires the appellant to act in the name or on of behalf of either Sporting or Inter, nor is there any requirement for the appellant to have power to bind either of those two clubs. It is very difficult to see how any such requirement could apply to the second limb of the paragraph 10(2) provisions of intending to facilitate. The fact that paragraph10 is headed "Intermediaries" is neither here nor there since it is not part of the operative part of paragraph 10, nor does it provide a free standing definition of intermediary. It simply indicates that an intermediary for the purposes of domestic legislation is someone who falls within the ambit of paragraph 10(2).

(14) Article 10 PVD does not say that a contract of employment is not a transaction for VAT purposes. It considers the context of "independently" in Article 9 and must be construed in that context. It simply says that when an employee is acting as an employee, it is not acting independently of its employer. But that does not mean that there is no transaction within the meaning of Article 2 PVD. It is clear from *Lipjes* that it does not matter whether the principal transaction is subject to VAT. The issue here is that because the activity (namely the supply of services in relation to the players employment contract) was not in respect of an activity which was carried out independently, that simply means that it was outside the scope of VAT. There was still a transaction for VAT purposes, it was just that it was not carried on independently.

Mr Kohansal's evidence

18. Both Mr Bremner and Miss McArdle addressed me on the approach I should adopt towards Mr Kohansal's evidence. Their submissions are set out above. In my view Mr Kohansal tried to assist the tribunal. Whilst his evidence was on occasion discursive, he was not evasive, and gave coherent and helpful answers to the questions he was asked in cross examination. I found him a witness on whose evidence I can rely. Whilst he addressed matters of contractual interpretation, it is clear that they are not something on which he can properly give evidence as they are a matter of law for my consideration. So, for example, his understanding about the way in which clause 5 of the Player Representation Letter operated, and that he thought this referred not to the payment under clause 4 of that document but in respect of a proportion of the transfer fee, is clearly something for me to consider and not a matter for him. But the relevance of his evidence is to provide background to the activities of the appellant, and commercial and economic context to the contracts which must be construed in light of that context.

Post hearing submissions

19. I had just put the finishing touches to this decision when I received, unsolicited, an exchange of correspondence between the parties which had taken place after the end of the hearing, and which dealt with the date of the Waiver Letter. This seemingly stemmed from HMRC's questioning whether the Waiver Letter was, as asserted by Mr Kohansal, given to the player at the same time as he was given the Player Representation Agreement, on 1 August 2016. HMRC had asked the appellant for meta data evidence of the date of creation of the Waiver Letter. Following a review of the appellant's files, it seems that the PDF file was created on 4 March 2022. HMRC wished to draw this to my attention. They did not make any specific submission that I should infer from this that Mr Kohansal's evidence was thus inaccurate. But I think this was their implied submission. It was the appellant's submission that this was simply the date on which the PDF was created in order to provide an electronic version to the appellant's representatives. I accept this submission and nothing in this correspondence affects the conclusion I had reached regarding the reliability of Mr Kohansal's evidence on this point.

Findings of fact

20. From the evidence that I have recorded above, I make the following additional findings of fact:

(1) The player was obliged to pay the appellant 10% of his total gross income for services supplied by the appellant to the player under the Player Representation Agreement.

(2) The 3% commission referred to in the FARI was only a guideline and the FA accepted that higher commissions of up to 10%, were permissible within their regulations.

(3) The Waiver Letter which was given to the player was fully effective to waive the appellant's rights to its commission under clause 4 of the Player Representation Agreement. This is clear from the terms of that letter. Following the Waiver Letter the appellant no longer had any legal or other right to be paid that commission. This is consistent with the desire not to reregister the Player Representation Agreement with the FA and the commercial advantage of the waiver to the appellant.

(4) The appellant did not approach Inter under clause 5 of the Player Representation

Agreement with a view to seeking payment from Inter of the commission payable under clause 4. This is because there was no such liability to make a payment under clause 4 as it had been effectively waived by the Waiver Letter.

(5) The appellant provided the services set out at [8(13)-(14)]. It therefore provided services to Sporting, to the player, and to Inter.

(6) The services which it provided to the player included assistance with the negotiation of his employment contract with Inter. The services which the appellant provided to Inter included negotiation of the players employment contract as well as broking an effective transfer of the player's registration from Sporting to Inter.

(7) The services supplied by the appellant to Inter include those set out in clauses 2 a) and 2 b) of the Inter Agreement.

(8) The vast majority (90%) of the services supplied by the appellant related to the transfer of the player's registration and were supplied before 25 August 2016. This is evidenced not only by the oral evidence but also by the detailed terms set out in the Inter Agreement which in my view could not have been included in it had they not been the result of detailed discussion before then.

(9) The payment is 10% of the unadjusted transfer fee of €40 million.

(10) There is nothing in the Inter Agreement which suggests that the payment was made for services other than those supplied by the appellant to Inter.

The primary issue

21. I start by considering the terms of the relevant contracts. These are the Player Representation Agreement, the Waiver Letter, and the Inter Agreement. There is no suggestion that these are sham documents, although, as set out above, Miss McArdle does question whether the Waiver Letter, which was produced late in the day, was actually given to the player on the same date as he signed the Player Representation Agreement. However, I have found as a fact that the Waiver Letter was given to the player on that date and it was effective to waive the appellant's right to payment under clause 4 of the Player Representation Agreement.

22. Taking the Inter Agreement first. It is clear from recital D of that agreement that the appellant was acting not just for Inter, but also the player. And that it would act in the interests of both Inter and the player. This is consistent with the evidence of Mr Kohansal.

23. The Inter Agreement then goes on to deal with the services which would be carried out in the interests of Inter, and also making the successful provision of these services a "double condition" for payment of the appellant's fee. These services/conditions, were that the player would enter into an employment contract with Inter, and that his registration would be transferred to Inter from Sporting for a transfer fee equal to or lower than €45 million.

24. Miss McArdle suggested that these did not describe the services provided by the appellant to Inter. But I disagree with her. Whilst it is not perfectly worded, it accords with Mr Kohansal's evidence of the services which the appellant provided not just to Inter but to all of the parties involved in the transfer. Furthermore, had those services not been successfully

provided by the appellant on or before 31 August 2016, the appellant's fee would not have been paid. It was.

25. And whilst certain terms of the Inter Agreement suggests that it is prospective, and that the services which were to be supplied to Inter were to be supplied after 25 August 2016, to my mind that is simply sloppy drafting. I have found as a fact that the vast majority of the services which were supplied by the appellant were supplied prior to that date. This finding is fortified by the fact that paragraph 2 sets out the numerical position with clarity. This suggests to me that all of the details of the deal had been worked out prior to this agreement being signed which could only have taken place once the negotiations had, themselves, reached a conclusion.

26. I also accept the evidence that once the document had been signed there was, in fact, very little that needed to be done to effect the transfer of the player's registration from Sporting to Inter and to complete the player's employment contract with Inter. That work, the majority of which was undertaken by the clubs themselves, involved the mechanics of transfer of the player's registration. It did not require the appellant to do much if anything. If I were to consider the value of the services supplied by the appellant before and after that date, it is clear that the vast majority in terms of value were supplied before that date.

27. On a quantum meruit, if HMRC's view is correct (and that €3 million of €4 million was paid in respect of the services supplied by the appellant to the player) then that leaves €1 million worth of services supplied to Inter. This is not an unreasonable position, in theory, for HMRC to adopt. But Miss McArdle submitted that because there was no contract in place with Inter before 25 August 2016, and the only contract which existed prior to that date was the Player Representation Agreement, any payment made in respect of the period before 25 August 2016 could only have been made to the player and not to Inter.

28. I do not accept this as a matter of legal principle. But even if I were to, then HMRC are effectively saying that the appellant provided €1 million worth of services to Inter between 25 August 2016 and 31 August 2016 when the Inter Agreement terminated. And this flies in the face of the evidence.

29. As for that legal principle, for which I was given no authority, I do not agree with it. Simply because there is no written contract in place does not mean that any services supplied by a supplier to a recipient cannot be a supply for VAT purposes. Mr Bremner has pointed out the authority for that in *Newey CA.* A VATable supply simply requires a supply for consideration. And whilst the contractual position between the parties is crucial to identifying the identity of the supplier, the recipient, and the nature of the supply, there is no need for there to be a written contract for there to be a supply in the first place. If HMRC could only visit a VAT liability on a supplier who had entered into a written contract, I suspect their VAT take would be considerably reduced. So as a matter of principle, I can see no reason why the services provided by the appellant before 25 August 2016 could not have been made to Inter and could only have been made, on HMRC's submission, to the player.

30. Turning now to the Player Representation Agreement and the Waiver Letter (which to my mind must be read together). I have found as a fact that the Waiver Letter was given to the player on 1 August 2016, at the same time as he was given and signed the Player Representation Agreement.

31. That agreement sets out the services which the appellant would provide to the player (to provide introductions, leads, assistance and advice in relation to the transfer of the registration of the player from Sporting to another football club). And it also sets out, in clause 4, that in consideration for the provision of these services, the player would pay the appellant a commission of 10% of his gross income including image rights payments. It goes on to include, at clause 5, an obligation on the appellant to procure that the transferee club (Inter) should take on responsibility for payment of that commission.

32. But the Waiver Letter effectively negatives the provisions of clause 4 by dint of the appellant agreeing to waive any fees which would otherwise be due to it under clause 4. My interpretation of this is that it does not just waive the player's obligation to pay. It also waives the underlying liability. It is fully effective to absolve the player from any obligation or liability to provide consideration to the appellant in respect of the services which the appellant has provided under the Player Representation Agreement.

33. The contractual effect of the Waiver Letter on the provisions of the Player Representation Agreement and in particular clauses 4 and 5 of that agreement, is that the player had no obligation to pay the appellant the commission set out in clause 4. And so it is entirely logical that the appellant made no approach to Inter as it was required to do under clause 5 of that agreement, to procure that Inter took on responsibility for paying the commission. There was no commission to pay, so no need to approach Inter.

34. I now need to consider the contracts in the context of the economic and commercial reality of the arrangements to see whether they accurately reflect that economic and commercial reality.

35. There are two competing economic and commercial narratives.

36. HMRC's position, as I see it, is that it is accepted that the appellant provided services to the player, and it is inconceivable that the appellant, as a commercial organisation, would have done this without being paid for it. It received payment not from the player but from Inter, notwithstanding that the documents suggest that the payment by Inter was for services supplied by the appellant to Inter. Some part of that payment was consideration for the services supplied to the player.

37. The appellant's position is that the economic and commercial reality of the arrangements is clearly reflected in the contracts. The arrangements included a waiver by the appellant of any right to be paid for any services supplied to the player under the Player Representation Agreement. The economic and commercial justification for this was that it gave the appellant an edge compared with its rival agents. The vast majority of the services were supplied to Inter before 26 August 2016 and they related, in the main, to the transfer of the player's registration. No part of the payment related to the provision of services by the appellant to the player under the Player Representation Agreement.

38. I can fully understand HMRCs position and concern that (in my words not Miss McArdle's) there is untaxed consumption by the player of the services provided to him by the appellant. The player clearly received services from the appellant on which VAT should have been accounted by the appellant.

39. But in order for there to be taxable consumption the cases show that must have been a supply of services for consideration and I am afraid for HMRC that on the evidence of this case, it is my view that no such consideration was provided for the supply of services by the appellant to the player.

40. Not only do I find this to be clear from the contracts, but it is entirely consistent with the economic and commercial reality of the situation. There was a commercial advantage for agents such as the appellant with considerable financial muscle not to seek payment for its commission under a player's representation agreement. And why should the appellant not flex that commercial muscle in this particular instance. I accept the evidence that the reason that a commission of 10% was included in the Player Representation Agreement (and indeed in other such agreements) was to protect an agent against breach of contract by the player. And I further accept that the reason why the contractual waiver of liability was not included in the Player Representation Agreement itself was to ensure that there was no need to reregister that agreement with the FA. This all makes sound logical economic and commercial sense.

41. Miss McArdle suggests that notwithstanding the waiver, the appellant expected to get paid for the services which it supplied to the player. In her view there is no doubt that services were supplied to the player, and the only source of payment was Inter. It therefore follows that the payment by Inter was consideration for the supply of those services to the player.

42. But this is not borne out by the facts in this case. I accept that it was Mr Kohansal's evidence that the appellant expected to be paid for the services which it was supplying to the parties, and that the appellant had identified that the appropriate fee for those services was €4 million. However, what I need to decide is to whom those services were supplied. Was that payment made exclusively for the services supplied to Inter (the appellant's case) or partially therefore, but in the main for services supplied to the player (HMRC's case).

43. There is no evidence from the contracts that the payment was made for anything other than services supplied to Inter. There is no evidence from the contracts that it was third party consideration. The contractual evidence is that the payment was made under the Inter Agreement and the clear implication from that contract is that it was made in respect of procuring that the player entered into an employment contract with Inter and at the same time the effective transfer of the player's registration from Sporting to Inter.

44. This is not a case where HMRC allege that the documents were a sham, or that the arrangements were abusive. In particular, they do not suggest that the reason why the Waiver Letter was introduced into the arrangements was so that the appellant's services would be seen to be supplied exclusively to Inter and thus liability to VAT would be avoided.

45. The contracts are consistent with the appellant's case that the payment was made by Inter for services which the appellant supplied to Inter. Whilst there is no doubt that the appellant supplied services to the player under the Player Representation Agreement, the appellant received no consideration for the supply of those services either under that (by dint of the Waiver Letter) or via the payment from Inter (as there was no liability for the player to pay the commission under the Player Representation Agreement as it had been waived; and there is no evidence from either the contracts nor the surrounding economic and commercial circumstances that the payment by Inter was for anything other than the services supplied by the appellant to Inter (as identified in the Inter Agreement and Mr Kohansal's oral evidence)).

46. Those services comprised the procurement of an employment contract between the player and Inter and the transfer of the player's registration. As regards the latter, it was Mr Kohansal's evidence that this consumed 90% of the appellant's time and effort. As regards the former, I can see that there was a benefit to the player of entering into an employment contract, but there was a similar if not greater benefit to Inter since it was only possible for the effective transfer of the player to proceed once that employment contract had been concluded. It is economically and commercially realistic for Inter to pay for that.

47. It is my view that the payment was made in consideration for the services supplied to Inter and not as consideration for services supplied to the player. The place of that supply was Italy. There is no liability for the appellant to account for VAT.

The paragraph 10 issue

48. Mr Bremner submitted in both his skeleton argument and in his oral representations that I need only consider his alternative paragraph 10 argument if I found that €3 million of the payment had been paid by Inter as third-party consideration for supplies made by the appellant to the player. I have found this not to be the case and have found in his favour on the primary point.

49. However, given that the paragraph 10 point was argued before me (although not into the corners), I am not taking him at his word. Whilst strictly speaking there is no need for me to come to a conclusion on the paragraph 10 arguments in light of my decision on the primary point, I set out in brief terms my view of the application of paragraph 10.

50. At face value, on the evidence before me, it is clear that the appellant was undertaking activity intended to facilitate a supply of the player's registration from Sporting to Inter. It undertook negotiations between Sporting, Inter and the player. It needed to ensure that the player's registration was transferred to Inter, and at the same time, the player entered into an employment contract with Inter. This brings its services within the ambit of paragraph 10.

51. Miss McArdle submits that paragraph 10 is not engaged since the underlying transaction (namely the employment contract which was to be entered into between the player and Inter) is not a transaction recognised as such in VAT law. Transaction is the term used in the PVD and is equivalent to a supply in domestic parlance. This takes the circumstances of this case outside the ambit of *Lipjes* which is relied on by the appellant.

52. I am afraid I cannot see that it does. In *Lipjes* the agent was acting as a yacht broker in a deal between two individuals. Neither of those individuals were acting as taxable persons. At paragraph 29 and 30 of the Advocate General's opinion, it is made clear that the scope of the intermediaries' exemption in the Sixth Directive was broad enough to include all intermediary activities other than those specifically exempted therefrom, regardless of the capacity in which a seller and customer act in the principal transaction. This sentiment is stated in paragraph 37 of that opinion and again in paragraph 14 of the judgment of the court itself "there is no reason to depart from that rule when the underlying contracts are non-taxable transactions".

53. In this appeal, there is a non-taxable transaction. This is because when acting in its capacity as employer, Inter does not act as a taxable person since it is not acting independently. Since it is not acting as a taxable person, in those circumstances the entering into of the employment contract and supplies made under it outside the scope of VAT.

54. So the intermediaries' exemption in the PVD can apply even if the underlying transaction is outside the scope of VAT and is not a transaction recognised by VAT law (in Miss McArdle's words).

55. I agree therefore with the analysis of Mr Bremner that the supply of services by the appellant in relation to the facilitation of the player's employment contract and transfer of registration fall within the ambit of paragraph 10.

56. But I cannot look at paragraph 10 in isolation. As Miss McArdle says, on the authority of *Marleasing*, that notwithstanding that the provisions of a Directive cannot be relied upon by a member state against a taxpayer (and so, bluntly, the taxpayer may rely on domestic legislation if it is more advantageous than the provisions of its enabling directive) I must interpret UK law in the light of the wording and purpose of the directive. In this case, therefore, I must construe the provisions of paragraph 10 in light of the provisions of Article 44 PVD, which means, Miss McArdle submits, that the appellant can only be within paragraph 10 if it acts in the name and on behalf of another person.

57. The leading case on conforming interpretation is *Vodafone 2 v Revenue and Customs Commissioners* [2009] EWCA Civ 446 ("***Vodafone***"). At paragraphs 37 and 38 Sir Andrew Morritt sets out the relevant principles. I am under a broad and far-reaching obligation to construe domestic legislation consistently with community law. I can depart from the strict and literal application of the words used in domestic legislation and I can imply into the domestic legislation words necessary to comply with community law obligations. However, there are constraints. The meaning must go with the grain of the legislation and be compatible with its underlying thrust; my interpretation of the domestic legislation should not be inconsistent with the fundamental or cardinal feature of the European legislation; I should not adopt an interpretation for which I cannot assess the practical repercussions.

58. Applying these principles, I think Miss McArdle is right and that in order to act within the ambit of paragraph 10, the person undertaking the activity intended to facilitate the making of the underlying supply must do so in the name and on behalf of another person. This goes with the grain of the European legislation. Mr Bremner suggests that this is judicial legislation. I disagree. It is perfectly possible to interpret the "activity facilitating" provisions in paragraph 10 by introducing this further condition given the broad and far-reaching obligation I have to construe paragraph 10 in light of Article 46. It is simply a question of that broad reaching statutory construction rather than creating new law. However it begs the question as to what that term means in practice, and who that other person must be.

59. In *Firstpoint (Europe)* Ltd v *HMRC* [2011] UKFTT 708, where the tribunal was considering the predecessor of Article 46 PVD, the tribunal thought that the phrase in the name and on behalf of another person was a low threshold. It simply meant that the agent was not acting for an undisclosed principle.

60. Without having had this point fully argued before me, I am reluctant to come to a definite view, but it seems to me that the expression does not require any formality of documentation, simply recognition by the parties of the role that an intermediary plays in a transaction. In this appeal the evidence shows, and I have found as a fact, that the appellant provided services to both the player and to Inter and that Inter knew that the appellant was providing services to the player, and that the player knew that the appellant was providing services to Inter. This is the

case even if the parties may not have seen the written agreements until the deal closed. And whilst they might not have known the precise details of services, both knew that they were in connection with the transfer of the player's registration from Sporting to Inter. I can reasonably infer from the primary facts that not only was the appellant acting on behalf of the player and Inter but that all parties knew this. I also think that it is reasonable to further infer from this that the appellant was acting in the name of these persons. Clearly the appellant acted in the name of the player, that much is clear from the services it supplied to the player under the Player Representation Agreement. But I have no doubt that when discussing the transfer with Sporting and with the player, the appellant was acting in the name of Inter.

61. As to the identity of the person on whose behalf the appellant acted, it is clear from what I have said above that in this case it needed to be, and was, the player and Inter.

62. Miss McArdle however goes one stage further and says that the appellant must not just act in the name and on behalf of another person, it must have power to bind that other person. This is not a provision of the PVD. It stems from principles set out in the First-tier Tribunal decision in *Newcastle University*. Mr Bremner suggests that this is misconceived and that the power to bind is a condition stemming from the intermediaries' legislation relating to financial intermediaries and cannot be read more broadly than that. I am not certain he is correct.

63. Without having had this fully argued, I have come to a conclusion on this point with some considerable trepidation. And I am very glad I that I have not had to decide this case on this particular point. But it seems to me that paragraph 10 is designed to "drag along" services which are provided by a person who acts as an agent in respect of making arrangements for facilitating an underlying supply which is made to someone who is not a relevant business person. In such circumstances these agency services are dragged along with the underlying services and are deemed to be supplied in the same country as the underlying services. To my mind therefore the threshold for these ancillary services is a low one. And whilst facilitating activities does require the person to act in the name and on behalf of one or more of parties to the underlying supply, I do not think that adopting a conforming interpretation obliges me to find that they must also have power to bind one or more of those parties. To do so would go against the grain of the domestic legislation and against its underlying general thrust. This would be creating judicial legislation and I am not equipped to make such a decision nor to evaluate whether there are important practical repercussions of reading a power to bind into paragraph 10.

64. I have therefore reached the conclusion that if I had not found for the appellant on its primary case, I would have found that the otherwise taxable services supplied by it to the player fall within paragraph 10 and thus would be deemed to have been supplied in Italy as that is the place where the underlying supply (namely the transfer of the player's registration) is treated as having taken place.

DECISION

65. I allow the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

66. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant

to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL

TRIBUNAL JUDGE

Release date: 18th APRIL 2023

Appendix

1. VAT is charged (inter alia) "on the supply […] of services in the United Kingdom" (section 1(1)(a) VATA). Section 4 VATA provides that:

"**4 Scope of VAT on taxable supplies**

(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.

(2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply".

Accordingly, in order for a charge to UK VAT to arise, it is necessary for the supply in question to have been made in the United Kingdom.

2. Section 5(2) VATA provides, subject to immaterial exceptions, that:

"(a) "supply" in this Act includes all forms of supply, but not anything done otherwise than for a consideration;

(b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services".

3. Section 7A VATA deals with the place of supply of services. It provides as follows:

"**7A Place of supply of services**

(1) This section applies for determining, for the purposes of this Act, the country in which services are supplied.

(2) A supply of services is to be treated as made—

(a) in a case in which the person to whom the services are supplied is a relevant business person, in the country in which the recipient belongs, and

(b) otherwise, in the country in which the supplier belongs.

(3) The place of supply of a right to services is the same as that in which the supply of the services would be treated as made if made by the supplier of the right to the recipient of the right (whether or not the right is exercised); and for this purpose a right to services includes any right, option or priority with respect to the supply of services and an interest deriving from a right to services.

(4) For the purposes of this Act a person is a relevant business person in relation to a supply of services if the person—

(a) is a taxable person within the meaning of Article 9 of Council Directive 2006/112/EC,

(b) is registered under this Act,

(c) is identified for the purposes of VAT in accordance with the law of a member State other than the United Kingdom, or

(d) is registered under an Act of Tynwald for the purposes of any tax imposed by or under an Act of Tynwald which corresponds to value added tax, and the services are received by the person otherwise than wholly for private purposes.

(5) Subsection (2) has effect subject to Schedule 4A.

(6) The Treasury may by order—

(a) amend subsection (4),

(b) amend Schedule 4A, or

(c) otherwise make provision for exceptions from either or both of the paragraphs of subsection (2).

(7) An order under subsection (6) may include incidental, supplemental, consequential and transitional provision".

4. The rulemaking power given to the Treasury has been exercised but not in a manner which affects this appeal.

5. Schedule 4A contains a number of special rules in relation to the place of supply of services. In particular, paragraph 10 of Schedule 4A provides that:

"**SCHEDULE 4A PLACE OF SUPPLY OF SERVICES: SPECIAL RULES**

[…]

PART 3 EXCEPTIONS RELATING TO SUPPLIES NOT MADE TO RELEVANT BUSINESS PERSON

Intermediaries

10-

(1) A supply of services to which this paragraph applies is to be treated as made in the same country as the supply to which it relates.

(2) This paragraph applies to a supply to a person who is not a relevant business person consisting of the making of arrangements for a supply by or to another person or of any other activity intended to facilitate the making of such a supply".

6. The provisions of UK domestic law seek to implement (inter alia) Articles 2 and Articles 44 to 46 of the PVD.

7. In relation to the scope of VAT, Article 2(1)(c) PVD provides that:

"1. The following transactions shall be subject to VAT:

[…]

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such".

For these purposes, the "territory of a Member State" means (Article 5(2)):

"the territory of each Member State of the Community to which the Treaty establishing the European Community is applicable, in accordance with Article 299 of that Treaty, with the exception of any territory referred to in Article 6 of this Directive".

Article 24(1) PVD specifies that:

"'Supply of services' shall mean any transaction which does not constitute a supply of goods".

8. In relation to place of supply, Articles 44 to 46 PVD provide that:

"**Title V PLACE OF TAXABLE TRANSACTIONS**

[…]

Chapter 3 Place of Supply of Services

[…]

Section 2 General rules

Article 44

The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides.

Article 45

The place of supply of services to a non-taxable person shall be the place where the supplier has established his business. However, if those services are provided from a fixed establishment of the supplier located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the supplier has his permanent address or usually resides.

Section 3 Particular provisions

Subsection 1 Supply of services by intermediaries

Article 46

The place of supply of services rendered to a non-taxable person by an intermediary acting in the name and on behalf of another person shall be the place where the underlying transaction is supplied in accordance with this Directive".